IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1171

JAMES Y. CARTER, Public Vehicle License Commissioner of the City of Chicago, *Petitioner*

vs.

LUTHER MILLER, on his own behalf and on behalf of all others similarly situated, *Respondent.*

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

WILLIAM B. SPANN, JR., *President*
ROBERT B. MCKAY
MELVIN T. AXILBUND
JOANN R. DEUTCH

AMERICAN BAR ASSOCIATION
1155 East 60th Street
Chicago, Illinois 60637
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF AMICUS CURIAE

The American Bar Association is a national membership organization of the legal profession. It counts as members more than 219,000 lawyers from all states. For many years the Association has maintained an active interest in the improvement of the criminal justice system.

Most relevant to this case, in 1970 the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services. In this way the Association sought to exercise responsible leadership in examining correctional problems and stimulating needed change in federal, state, and local systems for the correction and rehabilitation of offenders. Two of the various projects sponsored by the Commission have an especially close connection with the issues in this case. The National Clearinghouse on Offender Employment Restrictions, which operated from November, 1971 to March, 1977, identified legislative and practical impediments—including restrictive licensing practices—which inhibit the employment of ex-offenders[1] and thereby increase the chance of recidivism. The Clearinghouse worked with government officials and others to remedy these ill-conceived and counter-productive practices. During the Clearinghouse's life significant improvements were made in half of the states in the form of changed laws and policies.

Similar efforts have been engaged in by state and local bar associations. Some of these have been financed in part by grants provided through the Commission's BASICS program (Bar Association Support to Improve Correctional Services). One of the associations which received such support was the Chicago Council of Lawyers. It concluded its study of Chicago and Illinois licensing practices in April, 1975.

In 1975 the Association expressed its opposition to laws which deny occupational licensing of ex-offenders without consideration of the relationship between the offender's record and the position or license sought. More recently, the Association's Joint Committee on the Legal Status of Prisoners published a *Tentative Draft of Standards Relating to the Legal Status of Prisoners*. Portions of the *Tentative Draft* expand on the 1975 policy. The 1975 policy and relevant *Tentative Draft* standards are set forth in the Appendix.

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[1] The negative impact of a conviction on employment opportunities has been recognized by this Court. *James* v. *Strange*, 407 U.S. 128, 139 (1972).

As early as 1921 the American Bar Association adopted standards for legal education, providing in part that every candidate for admission to the bar "should be subject to an examination by public authority to determine his fitness."[2] This Court has authoritatively determined that "fitness" to enter the sensitive legal profession embraces the candidate's present fitness,[3] a sound precept which the Association supports. It is to argue the applicability of this precept to other fields of endeavor that the Association sought the consent of the parties to the filing of this brief *amicus curiae*.[4]

QUESTIONS PRESENTED BY AMICUS

Is a municipal ordinance which prohibits issuance of a public chauffer's license to an ex-offender convicted of armed robbery—for that reason only—violative of the Equal Protection Clause when present licensees face only discretionary revocation of their licenses upon conviction of an identical offense? Is it violative of the Due Process Clause to deny licensure in these circumstances without any individualized determination of fitness?

STATEMENT OF THE CASE

Luther Miller is an ex-offender. As a young man, in August, 1965, he was convicted of armed robbery in the Circuit Court of Cook County, Illinois. He was sentenced to a term of seven to twelve years in the penitentiary. After serving seven years, he was released on parole in February, 1972. Eighteen months thereafter, having complied with the terms and conditions of his parole, he was unconditionally discharged.

In September, 1974, Miller sought to apply for a public chauffer's license pursuant to a municipal ordinance as a

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[2] 46 *Reports of the American Bar Association* 38, 47 (1921).

[3] *Schware* v. *Bd. of Bar Examiners*, 353 U.S. 232, 246 (1957).

[4] Copies of letters indicating the parties' consent have been filed with the Clerk of the Court.

preliminary step to seeking private employment as a taxi-cab, public transit or ambulance driver. However, upon informing an agent of the Public Vehicle License Commissioner that he had once been convicted of armed robbery, the agent declined to accept his application. Relying on the ordinance at issue here, the agent wrote: "Anyone convicted of armed robbery may *not apply*." (App., at 10) (emphasis added). Thereafter, Miller filed suit in the United States District Court for the Northern District of Illinois to vindicate his rights as guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Miller also alleged his rights under the Eighth Amendment were violated. Miller also sought to have the case certified as a class action, a matter which the District Court did not pass in granting Defendant Carter's motion to dismiss on January 17, 1975.

1. The Ordinance

Chapter 28.1-2 of the Municipal Code of the City of Chicago, enacted in 1951, makes a public chauffer's license a prerequisite for any person wishing to be employed "transporting . . . passangers for hire." The ordinance is administered by the City's Public Vehicle License Commissioner, who may require from an applicant any information pertaining to "character, reputation . . . past employment and conduct" deemed relevant by him to qualification for a chauffeur's license.

The Commissioner submits the name of each applicant to the captain of the police district in which the applicant resides for an investigation into the "character and reputation" of the applicant. *Chicago Municipal Code* Ch. 28.1-4. The police report is submitted to Carter, who approves or disapproves the application:

> If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license. *Chicago Municipal Code* Ch. 28.1-4.

Thus, the ordinance grants the Public Vehicle License Commissioner broad investigative power before final approval of any applicant for a chauffeur's license, as well as discretion in determining whether the applicant is a "suitable" person for licensure.

No system of individualized assessment is apparently employed in the case of ex-offenders such as Miller. The Commissioner is denied authority to approve the application of a person who has been convicted of an offense involving the use of a deadly weapon. Chapter 28.1-3 provides, in relevant part:

> No public chauffeur's license shall be issued to any person who has been convicted of a felony or any criminal offense involving moral turpitude within eight years prior to his application for such license, excepting only if such person shall have received, since the time of his conviction, an honorable discharge from any branch of the armed services of the United States of America, and if, in the discretion of the public vehicle license commissioner, such person is trustworthy of the responsibility imposed by the issuance of such license. *No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape.* (emphasis added.)

It is the constitutionality of the emphasized portions of this section which is at issue in the case at bar.

Another provision of the *Chicago Municipal Code* Ch. 101 *et seq.* governs the administration of all licensing ordinances within the City of Chicago, including the Public Chauffeur's Ordinance. If a license application is denied after an investigation into an applicant's "character or fitness," Chapter 101-5 provides that the applicant "shall be notified in writing, of the reasons for the disapproval." He may than request a hearing on the disapproved application. Similarly, those already licensed may request a hearing if their license is revoked. *Id.* Ch. 101-27.

Respondent Miller has not sought nor been granted a hearing. Such a hearing apparently would be meaningless, because the ordinance deprives the Public Vehicle License Commissioner of any discretion to issue a license, regardless of the findings of any investigation or hearing, to a person such as Miller.

DECISIONS OF THE LOWER COURT

The District Court had before it only Miller's amended complaint, Carter's motion to dismiss and Miller's opposition thereto when it granted the Commissioner's motion in a short memorandum opinion. (App., at 15-16). The District Court found the ordinance was rationally related to a legitimate public purpose, "the protection of the public who makes use of public vehicles" and that the classification established by the provision absolutely precluding Miller's licensure was rational. The District Court also found the Eighth Amendment inapplicable since the ordinance did not seek to punish offenders.

The Court of Appeals reversed in a *per curiam* opinion *Miller* v. *Carter, supra*. In analyzing the provisions of ordinance itself, the Court noted that, although each applicant must satisfy a "good character and reputation" investigation, the Commissioner is not allowed to issue a license to persons such as Miller who have been convicted of certain disabling offenses.

The Court of Appeals found the Commissioner's "purported justification" for this different treatment of similarly situated persons wholly unpersuasive. Rejecting the argument that the licensees' "track record" explains the distinction and concluding that "such distinctions among those members of the class of ex-offenders are irrational," the Appeals Court held that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment. Taking note of Miller's challenge to the "irrebuttable presumption" created by the ordinance, the *per curiam* opinion briefly reviewed the pertinent decisions of this Court, without drawing a conclusion as to their applicability.

One member of the panel, Senior District Judge William J. Campbell, filed a separate concurring opinion in which he carefully analyzed the irrebuttable presumption doctrine, found it applicable to this case, and concluded that the challenged ordinance failed to pass muster on due process grounds, as well as those relied on in the *per curiam* opinion.

On Carter's motion, the Court of Appeals stayed issuance of its mandate to enable Carter to seek review in this Court. Certiorari was granted April 18, 1977.

SUMMARY OF ARGUMENT

The Chicago municipal ordinance which governs licensure of taxi drivers does not treat all persons who have violated criminal laws alike. It permanently prohibits some ex-offenders from obtaining a public chauffeur's license and creates an eight year waiting period in the case of others. Persons who hold licenses at the time of their conviction, however, are subject to a discretionary bar at most. Because the facts behind the convictions which create the prohibition in each case may be identical, but the results may be disparate, the Court of Appeals properly found the ordinance subjected some ex-offenders to "irrational" discrimination.

The challenged ordinance makes no provision for offenders such as Respondent to show they were not guilty of an offense which activates the permanent ban, or any facts concerning their rehabilitation. The language of the ordinance does not track the Illinois criminal code in material regards. Such inconsistencies can lead to grossly different outcomes for similarly situated persons. Thus some procedure seems essential for determining whether the permanent ban is applicable in individual cases.

The ordinance's true purpose appears to be to keep offenders thought to be dangerous from driving taxi cabs. But there is no material in the record to support the presumed

permanent dangerousness of former robbers. Indeed, there is evidence that in Illinois, at least, released armed robbers such as Respondent are unlikely to commit new offenses or be returned to prison within two years of their first release. In concluding to the contrary, the Chicago City Council ignored sound public policy considerations.

Finally, the opportunity to qualify for employment at a common calling such as taxi driving is important enough to merit at least the minimal Constitutional protection of an individualized, fact-related inquiry into the license applicant's fitness for that occupation.

ARGUMENT

I. THE ABSOLUTE BAN ON LICENSURE OF SOME EX-OFFENDERS INCORPORATED IN CHICAGO'S PUBLIC CHAUFFEUR ORDINANCE IS IRRATIONALLY DISCRIMINATORY AND THEREBY DENIES THE EQUAL PROTECTION OF THE LAW TO SOME EX-OFFENDER APPLICANTS.

The Court of Appeals in this case held that "[a]n applicant for a [public chauffeur's] license who has committed [an armed felony] and a licensee who has done the same are similary situated, and no justification exists for automatically disqualifying one and not the other." *Miller* v. *Carter*, 547 F. 2d 1314, 1316 (7th Cir. 1977) *(per curiam)*.

Petitioner Carter asserts that treating licensees and applicants as similarly situated is "fundamentally erroneous." Petitioners' Brief at 11. That may well be; however, the Court of Appeals properly was not concerned with the differential treatment of *all* applicants and *all* licensees; rather the issue before the Court of Appeals and this Court is whether Chicago's public chauffeur ordinance improperly subjects to "irrational" discrimination some members of "the class of ex-offenders." *Miller, supra.*

Only at p. 2 of his Reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari has Carter specifically asserted that the Court of Appeals erred in examining the licensing scheme only as it applied to ex-offenders. Otherwise he has consistently sought to broaden the case to include issues which are not before this Court. Respondent has never challenged the authority of the City of Chicago to regulate the transportation of passengers for hire within its corporate limits. *City of Chicago* v. *Vokes*, 38 Ill. 2d 475 (1963). Nor has Respondent ever asserted that it is improper to root licensure in the "good character and reputation" of the applicant and the vague standard of being "a suitable person to be entrusted with driving a public passenger vehicle." *Chicago Municipal Code* Ch. 28.1-4. Indeed, Respondent has not even argued that his criminal history is irrelevant to his current fitness to drive a cab, the principal occupation of public chauffeurs. Respondent's only claim as regards the Equal Protection Clause is that if the local authorities deem criminal misbehavior to be relevant to the fitness issue, as they have, then they must deal with that criterion equally for all to whom it applies. Because the challenged provisions of the municipal code "discriminate irrationally" on their face, the Court of Appeals held them invalid under the Equal Protection Clause. *Miller, supra.*

While all ex-offenders are not alike, they share the fact of conviction, a characteristic which too often has been thought—in public and private sectors—to justify limitations on participation in the usual life of the community.[5] The Chicago

[5] Thus, some states limit the ex-offender's right to vote, *Richardson* v. *Ramirez*, 418 U.S. 24 (1974); some states disqualify them from holding public office, serving on juries, etc., (see restrictions enumerated in Special Project, the Collateral Consequence of a Criminal Conviction, 23 *Vand. L. Rev.* 929 (1970)); a variety of governments require offenders to register upon entry into the jurisdiction, Dreher and Kammler, *Criminal Registration Statutes and Ordinances in the United States—A Compilation* (1969); bonding companies deny coverage to insured's that employ ex-offenders, Lykke, "Attitude of Bonding Companies Toward Probationers and Parolees," 21 *Fed. Prob.* 37 (1957); and private employers deny jobs to ex-offenders for that reason alone, *see, e.g., Green* v. *Missouri Pac. R.R.*, 523 F. 2d 1290 (8th Cir. 1975). Offenders have generally been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (*per curiam*) (1976).

City Council thought that characteristic was relevant to public chauffeur licensure and so it is appropriate that the court below and this Court examine the manner in which the City Council ordained that it be considered.[6] *Amicus* respectfully submits that the fallacy of Chicago's peremptory approach to limiting ex-offenders access to jobs as taxicab drivers is the same as, and no less evil than, the Arizona alien employment law scrutinized here 60 years ago and struck down. *Truax* v. *Raich*, 239 U.S. 33 (1915). Accord *Sugarman* v. *Dougall*, 413 U.S. 634 (1974), and *In re Griffiths*, 413 U.S. 717 (1973).

A. The Ordinance Permanently Prohibits Licensure of Some Ex-Offenders Without Regard to the Facts Underlying Their Offenses, and Delays it for Others, While Subjecting Licensees Whose Criminal Misconduct is More Recent to Purely Discretionary Sanctions.

Conviction of an offense produces one of three consequences under the *Chicago Municipal Code* Ch. 28.1. An offender may be permanently precluded from driving a cab, *Id.* Ch. 28.1-3; he may be temporarily precluded, *Id.;* or he may not be precluded at all if previously licensed, *Id.*, Ch. 28.1-10.

The language of the ordinance permanently bars from licensure persons convicted of the following offenses: "a crime involving the use of a deadly weapon, traffic in narcotic drugs, the infamous crime against nature, incest or rape." *Id.*, Ch.

[6] Illinois' law respecting school bus drivers should be contrasted with the municipal ordinance challenged here. It is indicative of the growing trend to accord properly limited weight to an ex-offender's criminal record. The state law prohibits only temporarily the issuance of a school bus driver permit to persons convicted of various offenses, including murder, rape, deviate sexual conduct or assault, indecent liberties with a child, contributing to the sexual delinquency of a child, aggravated incest, possession, sale or exchange of instruments adapted for illegal drug use or abuse, possession of a deadly weapon, armed violence, and illegal manufacture, sale or delivery of controlled substances, among other specifically enumerated offenses. *Ill. Rev. Stat.* Ch. 95 1/2, § 6-106.1 (a)(11). One convicted of these offenses may obtain a permit (other criteria having been satisfied) five years after conviction upon a showing he has led "an exemplary life and has become a law-abiding citizen." *Id.*

28.1-3. Relying on this provision, Petitioner declined to accept Miller's application. "Rape" is a specific offense under the Illinois Criminal Code, *Ill. Rev. Stat.* Ch. 38, § 11-1. However, "traffic in narcotic drugs," and "the infamous crime against nature" are not found therein as such. Although "incest" is a code offense, *Id.*, § 11-11, "aggravated incest" is a separate offense, *Id.*, § 11-10 and the ordinance challenged here strangely takes no note of it. The ordinance's use of outmoded or incorrect terminology makes it difficult to see how Petitioner can accurately relate, much less rationally relate, the criminal histories of certain applicants to the intent of the ordinance without some process.

The offense of armed robbery, Respondent's offense, *Id.*, § 18-2, requires that the perpetrator be "armed" with a "dangerous" weapon. By its terms the ordinance requires "use", *Chicago Municipal Code* Ch. 28.1-3, an apparently different criterion. The facts of Miller's case, therefore, may not bring him within the intended scope of the permanent licensing prohibition. Even if Miller both possessed and used a weapon in 1965, it is not necessarily true that the weapon then found "dangerous" was also "deadly" as the ordinance requires. Subsequent events also may dissipate the propriety of allowing Respondent's conviction to stand in bar of licensure.[7]

Temporary preclusion under the ordinance is applicable to a person who, during the eight years prior to his application, was convicted of "a felony or any criminal offense involving moral turpitude." *Id.* While it is easy to determine if conviction was had for a felony, the concept of "moral turpitude" long has been criticized for its unpredictable elasticity.[8] Through its

[7] Petitioner's action has deprived Miller of the opportunity to show, if applicable, that his conviction had been overturned on collateral review or that a pardon had been secured. "Accordingly, the municipal ordinance states that applicants who have been convicted of a crime involving the use of a dangerous [sic] weapon are ineligible for a license and makes *no provision* for a contrary determination." Petitioner's Brief at 12 (emphasis added).

[8] Monheim, "Administrative Law: Professional and Occupational Licensing," 44 *Calif. L. Rev.* 403, 406 (1956).

focus on the conviction offense, the ordinance may allow disparate treatment of applicants whose objective behavior was identical. For example, the act of taking property from another while armed may actuate the permanent or temporary denial of a license depending on the outcome of plea bargaining.

An even more grossly inconsistent outcome would arise where the offense was premeditated murder by strangulation, poison, or arson, in which case only a temporary ban on licensing would apply, as an Illinois appellate court found in considering the instant public chauffeur ordinance in another ex-offender's case. *Roth* v. *Daley*, 119 Ill. App. 2d 462, 256 N.E. 2d 166 (1970). Offenses closely connected with safe operation of motor vehicles, such as involuntary manslaughter or reckless homocide, *Ill. Rev. Stat.* Ch. 38, § 9-2, appear to invoke only a delay in licensure, not an absolute ban.

Finally, depending on the rigidity of his interpretation of the ordinance, Petitioner may conceivably permanently deny licensure to one whose offense was misuse of an air rifle, for which "petty" offense the sentence is a fine which may not exceed $500. *Ill. Rev. Stat.* Ch. 38, § 82-7. Because the District Court granted Petitioner's motion to dismiss before any evidence was heard, we do not know the actual consequences of these inconsistencies.

The irrationality of these differences is heightened in the case of the licensee. Under the ordinance, loss of a license previously secured is entirely discretionary; if the offense is one which would otherwise disqualify an applicant, the Petitioner *may* recommend license suspension or revocation to the mayor, "and the mayor, *in his discretion, may* revoke such license." *Chicago Municipal Code* Ch. 28.1-10. (emphasis added.) It is unknown whether previously issued licenses are unfailingly revoked by the Mayor when his discretion is called into play by the conviction of a taxi driver or whether a system of individualized determination is pursued. There is no evidence before the Court which supports Petitioner's assertion that "it must be

supposed that the licensing authority. . . will attach little significance to a brief employment record in weighing it against the conviction." Brief of Petitioner at 15.

B. The Application of Minimal Rationality Standards to Chicago's Licensing Scheme Shows That it Does Not Afford Equal Treatment to Persons in Similar Circumstances.

The Court of Appeals conceived that public safety considerations underlaid the ordinance, *Miller, supra,* 1316, and that is Petitioner's position as well: "The governmental interest at stake is the safety of taxi passengers . . ." Petitioner's Brief at 26.

An individual taxi driver may threaten the public safety through poor driving ability. In response to this threat the ordinance requires all applicants for municipal chauffeur's licenses to have a state chauffeur's license, *Chicago Municipal Code* 28.1-3, and authorizes the Public Vehicle License Commissioner to require applicants to demonstrate their driving skill, *Id.* at 28.1-5. Recognizing that certain physical conditions, such as poor vision, or particular illnesses, such as epilepsy or "heart trouble," may give rise to continuing or sudden threats, respectively, provision is made for inquiring into these matters. *Id.*, 28.1-3.

Without identifying the conditions particularly, the ordinance specifies that "infirmity of . . . mind . . . may render [an applicant] unfit to drive a public passenger. . . ." *Id.* This provision had led the instant Petitioner, in 1971, to deny a public chauffeur's license to Victor Freitag, a person who received treatment for a mental illness for six months in 1957. *Freitag* v. *Carter*, 489 F. 2d 1377, 1380 (7th Cir. 1973). Finding that the denial of the license as a "bad risk" without an inquiry into Freitag's "present mental condition or show[ing] him the evidence against him. . . ." violated Freitag's right to due process under the decisions of this Court, the Court of Appeals affirmed the judgment of the District Court requiring

that procedural due process be afforded to denied applicants. *Id.*, 1384. Subsequent to the District Court's decision, but prior to the hearing in the Court of Appeals, the Chicago City Council amended Chapter 101 of the Municipal Code, the "General Licensing Provisions," assertedly to provide due process to rejected applicants. Despite some linguistic problems, in that litigation the defendants claimed and the Court of Appeals found, *Id.*, 1383, that these new rules applied to the ordinance in question here. Carter did not seek *en banc* review of *Freitag* in the Seventh Circuit, nor petition for a writ of certiorari in this Court.

Petitioner has accepted, therefore, that *current* fitness, determined through a hearing after notice, is the relevant measure of an applicant's qualification for licensure. His refusal, grounded in the unamended public chauffeur licensing ordinance, to even consider the current fitness of Respondent, while assessing the current fitness of other ex-offenders and newly offending, but already licensed, drivers is a denial of equal protection.

The only justification Petitioner asserts for failing to individually assess the fitness of ex-offenders such as Miller is that the evidence available in his case would be less reliable and probative than that supplied by a performance record. Petitioner's Brief at 13. Administrative convenience is specifically disaffirmed. *Id.* However, the ordinance would bar issuance of a license to a person with Miller's offense history, even if that person had just left the identical job in another city, where a

performance record would have been established.[9] Moreover, Petitioner will assess the current fitness of offenders barred from licensure for eight years and non-offending members of the general public, although members of either group will lack a directly relevant "track record." Hence, Petitioner has failed to suggest any honest basis for not assessing Respondent's qualifications, a failure which makes clear that the ordinance is not at all related, much less rationally so, to the asserted public safety goal.

C. Contrary to Sound Public Policy, Chicago Municipal Code Ch. 28.1-3 Presumes the Unproven Dangerousness of Some Ex-Offenders and Denies Them the Right to Seek Gainful Employment as Taxi Drivers.

Although the foregoing discussion dealt with this case in the light most favorable to Petitioner, accepting his assertions

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[9] Indeed, Petitioner once invoked the identical provision challenged here in an attempt to deny a license to an armed robber whose "performance record" was acquired in Chicago. Leonard Roth was convicted of two counts of that offense in 1950. After confinement, he became an ambulance attendant-driver, in 1955, and subsequently the operator of an ambulance service. He had the proper licenses from the Chicago Board of Health. In 1967, ambulance attendant-drivers became subject to *Chicago Municipal Code* Ch. 28.1, and Roth applied for licensure under its provisions. Petitioner Carter denied the license, citing Ch. 28.1-3. The Circuit Court of Cook County subsequently entered judgment in Roth's favor in an action for declaratory judgment and mandamus. On appeal, the Appellate Court of Illinois, First District, affirmed that portion of the Circuit Court's judgment holding the instant language invalid and inapplicable to Roth. Carter was ordered to consider and act upon the application.

"In our opinion the provisions set forth in the last sentence in the last paragraph of 28.1-3 result in classifications which are unreasonable and arbitrary. Under these provisions an applicant who had perpetrated multiple murders by strangulation, poison or arson could be licensed, as could one who had been repeatedly convicted of Attempt to Rape, Burglary, Theft, Kidnapping, or Aggravated Battery. In view of this fact, we fail to perceive in what manner the prohibition contained in the ordinance bears any relationship to public health or safety." *Roth* v. *Daley*, 119 Ill. App. 2d 462, 256 N.E. 2d 166, 169 (1970).

regarding the purpose of the ordinance at face value, the ordinance's irrationality was plainly evident. It is readily apparent, however, that the ordinance also works a denial of equal protection to some would-be cabbies by permitting the application of unarticulated criteria.

The formal licensing criteria established by the challenged ordinance seek to provide a means by which Carter can prevent persons thought by the City Council to be necessarily dangerous from operating a taxi. Two provisions of the ordinance, Ch. 28.1-3 and Ch. 28.1-10, suggest that current or future dangerousness cannot unfailingly be concluded from the objective facts found during a criminal trial in which guilt was established by proof beyond a reasonable doubt.

> Thus, a licensee who has demonstrated through his performance that he has not violated his responsibilities as a cab operator, even though subsequently convicted of an armed felony, might nevertheless be found fit to continue in his employment. Petitioner's Brief at 13.

And an applicant guilty of an offense not enumerated in Ch. 28.1-3 of the ordinance faces no immutable hurdles to licensure after eight years. Petitioner makes no claim of inability to assess the dangerousness of ex-offenders in either of these groups; and, as a result of *Freitag*, he must also assess the dangerousness, to the extent relevant, of persons who may be mentally "infirm." But, a person such as Respondent can never, ever, lift the implication of dangerousness with which he is enshrouded by the language of the ordinance.

The implicit conclusion required by the ordinance that Miller is now and will remain forever too dangerous to be entrusted with operation of a cab is not supported by the facts of this case. Upon his conviction for armed robbery in 1965, Miller was sentenced to 7 to 12 years in the Illinois State Penitentiary. Brief for Plaintiffs-Appellants at 2, *Miller, supra*. He was paroled after seven years, his minimum sentence. *Id.* The period of parole was 18 months, at the expiration of which

period Miller was discharged. *Id.* Both the parole release and discharge decisions required the Illinois Parole and Pardon Board to make affirmative, discretionary decisions in Miller's favor under the applicable laws and rules.[10] Thus, shortly before Miller sought licensure as a public chauffeur, an official state agency with the responsibility and expertise to assess his behavior found him to be trustworthy.

Miller is not an unusual parolee in abjuring, as his parole conditions required, new criminal misconduct following his release from prison. When he sought a public chauffeur's license he had been at liberty for over two years. In 1972, Illinois paroled a total of 1792 males, of whom 318 had been committed for armed robbery. Two years after their release, 95 percent of these persons had not been returned to prison.[11] Illinois' experience is slightly better than the national average. Even in the broader data, however, there is no support for the inherent "dangerousness" of released armed robbers which can be inferred from the ordinance. Two years after release, 86 percent of the national cohort of armed robbers released in 1972 had not been returned to prison by reason of a new major conviction or a new major allegation;[12] and the same percentage remained at liberty after three years.[13]

Thus, permanent prohibition of the licensure of armed offenders, as applied to a person such as Miller, strays so far from the facts as to amount to a totally arbitrary ban. The lines drawn by the ordinance appear to be "the reflection of historic

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[10] *Ill. Rev. Stat., 1971, Ch. 208, § 203; Ch. 23, § 2519, 2523; Ch. 38, § 123-4.*

[11] Conversation with William L. Simonich, Research Analyst, Parole and Pardon Board, Illinois Department of Corrections, July 5, 1977.

[12] National Council on Crime and Delinquency Research Center, "Trend Analysis—Males, 1972 Two Year Follow-Up," Table VII, Part 1, Uniform Parole Reports (May, 1976). These data include outcome information on 100 percent of Illinois' 1972 parolees.

[13] *Id.*, "Three Year Follow-Up Analysis—1972 Parolees," Table VII, Part 1 (December, 1976). These data also include 100 percent of the 1972 Illinois parole cases.

prejudice rather than legislative rationality." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 98 (Marshall, J., dissenting.) (1973).

Furthermore, any deference which might have been accorded to the 1951 enactment of the Chicago City Council in earlier times is no longer due. Absent a showing, which Petitioner has not even attempted to make, that any evil then existing[14] still persists, the ordinance must be evaluated in its present context.[15]

In addition to its evident failure to relate rationally to the asserted goal of enhancing public safety, the ordinance Petitioner defends is not rationally related to broader penal policy. Whether confinement of an individual offender be initiated to incapacitate or rehabilitate him, deter others from like misconduct or merely to evidence society's wrath, as the Chief Justice has said:

> We take on a burden when we put a man behind walls, and that burden is to give him a chance to change. If we deny him that, we deny his status as a human being, and to deny that is to diminish our own humanity and plant the seeds of future anguish for ourselves.[16]

The implicit policy of this ordinance is "The Imprisonment Ends; the Sentence is Forever,"[17] a policy Illinois has explicitly rejected.

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[14] There appears to be no legislative history which may be examined to help understand the rationale for the City Council's enactment and provide a gauge of its rationality.

[15] As this Court itself has acknowledged, government bodies sometimes advance facially rational arguments in support of their actions rather than the "other, less weightly considerations" which may have led to them. *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632, 641 (1974).

[16] Burger, "No Man is an Island," address to the 1970 Mid-Winter Meeting of the American Bar Association, reprinted in ABA Commission on Correctional Facilities and Services, *Thoughts on Prison Reform: The Corrections Addresses of the Chief Justice of the United States*, 10 (1975).

[17] The quotation is the title of a study of the employment problems of ex-offenders in New York by Rick Waldemar (1972).

Effective January 1, 1973, Illinois enacted the Unified Code of Corrections.[18] Among the purposes of the *Code*, two are especially relevant here:

> (c) prevent arbitrary or oppressive treatment of persons adjudicated offenders . . .
>
> (d) restore offenders to useful citizenship *Ill. Rev. Stat.* Ch. 38, § 1001-1-2. In an effort to make this policy effective, the legislature made clear the temporary nature of the deprivations to which offenders could be subjected under the Unified Code of Corrections:
>
> § 1005-5-5. Loss and Restoration of Rights
>
> (a) Conviction and disposition shall not entail the loss by the defendant of any civil rights, except under this Section.
>
> (b) A person convicted of a felony shall be ineligible to hold an office created by the Constitution of this State until the completion of his sentence.
>
> (c) A person sentenced to imprisonment shall lose his right to vote until released from imprisonment.
>
> (d) On completion of sentence of imprisonment or on a petition of a person not sentenced to imprisonment, all license rights and privileges granted under the authority of this State which have been revoked or suspended because of conviction of an offense shall be restored unless the authority having jurisdiction of such license rights finds after investigation and hearing that restoration is not in the public interest.
>
> . . .

Additional evidence of Illinois' policy is provided by other work of the 77th General Assembly. That legislature approved over thirty measures, specifically providing that conviction of an

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[18] P.A. 77-2097, approved July 26, 1972.

offense would not constitute a bar to licensure in a variety of trades and occupations, including medicine and pharmacy in which the public has a special interest.

Indeed, it appears that the Mayor of Chicago had recognized the inappropriateness of the historical employment discrimination ex-offenders have faced and had committed the City to setting an example for private industry. At the same time as Respondent Miller was being released in February, 1972, Mayor Richard J. Daley was writing Congressmen Mikva and Railsback:

> Dear Congressmen Mikva and Railsback: . . . Chicago has recently undertaken what I believe is a significant new project in the field of offender rehabilitation. . . . As you know, most men leave our various penal institutions with only the means to maintain themselves for a short period of time. In addition, present employment practices tend to freeze a parolee out of the labor market. Few firms are willing to hire the ex-convict in any capacity. With its parolee emloyment [sic] program, the City of Chicago hopes to alter significantly the above conditions. The City will hire 100 ex-convicts—both men and women—who will work on a wide variety of jobs, e.g., truck driver, forestry laborer, counselor, or secretary. Support will not be restricted to employment alone. . . . Perhaps even more significant than the employment and support services themselves is the fact that the City is setting a trend which industry will hopefully follow. Doors previously barred to ex-convicts may open as a result of the policy set by the City of Chicago.
>
> There are, of course, many other areas in the corrections field demanding attention today. I believe, however, that one of our most significant challenges is to reduce the level of recidivism among offenders. I am hopeful that the parolee employment program is a step toward this objective.[19]

II. WHERE FITNESS IS ESTABLISHED AS A LICENSING CRITERION, DETERMINATION OF FITNESS MUST BE INDIVIDUALIZED TO COMPORT WITH THE DEMANDS OF THE DUE PROCESS CLAUSE.

Decisions of this Court establish that the individual's interest in gainful employment is sufficiently great to warrant protection. *Smith* v. *Texas*, 233 U.S. 630 (1914); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 412 U.S. 717 (1973); *Hampton* v. *Mow Sun Wong*, 429 U.S. 88 (1976); *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976).

Requiring Petitioner to recognize the significance of this interest and afford Respondent Miller a forum for demonstrating his fitness to function as a cab driver will not make it impossible for the City of Chicago to discharge the burden it has assumed of screening prospective drivers. It will merely focus the Petitioner's inquiry on facts which may relate to fitness and prohibit reliance on convenient shibboleths, as this Court has required in other areas where the fact sought to be relied upon was not necessarily or universally true. *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

The review of particularized facts thus required will not guarantee Respondent a license. Nor, in the event Respondent is licensed, will it guarantee him employment as a taxi driver. The pecuniary interest of taxi cab companies in avoiding

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[19] Letter from Hon. Richard J. Daley to Hon. Abner J. Mikva and Hon. Thomas Railsback, reproduced in "Corrections," Hearings Before Subcomm., No. 3 of the House Comm. on the Judiciary, 92nd Cong., 2nd Sess., ser. 15, pt. VI at 124 (1972).

litigation and liability to passengers in the event of misconduct by taxi drivers assures that ex-offenders such as Respondent will be multiply screened before they are allowed to take seats behind the wheel.

That a review of particularized facts is a viable alternative to the current practice of dealing with presumptions must be conceded by Petitioner. The ordinance already requires such reviews for all persons other than those in the class of which Respondent is a member. With an existing, presumably effective mechanism in place, the only decision required of this Court is that it be used to determine the fitness of another group of applicants.

Petitioner relies on *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), for the proposition that statutory imposition of an employment disability on an ex-offender does not deny due process. His reliance on that case is misplaced. First, the enactment there scrutinized was no simple municipal ordinance, enacted without a record of careful consideration. The Waterfront Commission Act was part of a complex, interstate plan, approved by the Congress, after extensive examination in several forms of waterfront criminality. More significantly, the Act contained its own limitations, recognizing the possibility of executive clemency or a parole board certificate of good conduct as intervening factors which could mute the enacted prohibition. Thus, the ban in *DeVeau* was both less severe and more clearly necessary than the ban in this case. Lacking the degree of necessity and care which went into formulation of that ban, *Chicago Municipal Code*, Ch. 28.1-3 cannot stand.

CONCLUSION

For the reasons set forth above, the American Bar Association urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

WILLIAM B. SPANN, JR., *President*
ROBERT B. MCKAY
MELVIN T. AXILBUND
JOANN R. DEUTCH

August, 1977

APPENDIX

RESOLUTION ADOPTED BY THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES AUGUST, 1975

Resolved, That the American Bar Association calls for the elimination of all laws which (a) deny government employment or occupational licensing of ex-offenders without consideration of the relationship between the offender's record and the position or license sought, and (b) permit adverse action against ex-offenders seeking government employment or occupational licensing based on arbitrary criteria, and further,

Resolved, That the American Bar Association urges the federal, state and local governments to assure that ex-offenders receive full and fair consideration in hiring and licensing decisions subject to their control.

TENTATIVE DRAFT OF STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS*

RECOMMENDED BY

THE ABA JOINT COMMITTEE ON THE

LEGAL STATUS OF PRISONERS

10.4 Employment and Licensing

(a) Barriers to employment of convicted persons based solely on a past conviction should be prohibited unless the offense committed bears a substantial relationship to the functions and responsibilities of the employment. Among the factors which should be considered in evaluating the relationship between the offense and the employment are the following:

(i) the likelihood the employment will enhance the opportunity for the commission of similar offenses;

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* 14 *Am. Crim. L. Rev.* 377, 414 (1977).

(ii) the time elapsed since conviction;

(iii) the person's conduct subsequent to conviction;

(iv) the circumstances of the offense and the person that led to the crime and the likelihood that such circumstances will recur.

(b) *Private Employment and Occupational Licensing.* Each jurisdiction should enact legislation protecting persons convicted of criminal offenses from unreasonable barriers in private employment. Such legislation should officially govern (1) refusing employment; (2) discharging persons from employment; (3) refusing fair employment conditions, remuneration, or promotion; (4) denying membership in any labor union or other organization affecting employability; and (5) denying or revoking a license necessary to engage in any occupation, profession, or employment . . .

(f) *Regulated Activities Other Than Employment.* Licensing or other governmental regulations should not exclude automatically persons convicted of any offense from participation in regulated activities. Persons should not be barred from regulated activity on the basis of a conviction unless the offense committed bears a substantial relationship to participation in the activity. In determining whether such a relationship exists, the factors listed in (b)* should be considered.

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* The parenthetical reference to subparagraph (b) contained in subparagraph (f) is a typographical error. The correct reference is to subparagraph (a).